

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

IN RE: WESTERN STATES)	
WHOLESALE NATURAL GAS)	
ANTITRUST LITIGATION,)	
_____)	
LEARJET, INC., et al.,)	
Plaintiffs,)	2:03-CV-1431-PMP-PAL BASE FILE
v.)	<u>ORDER</u>
ONEOK, INC., et al.,)	
Defendants.)	

Presently before the Court is Defendant CMS Energy Corporation's Motion to Dismiss for Lack of Personal Jurisdiction (2:06-CV-0233-PMP-PAL, Doc. #59), filed on September 29, 2006. On November 14, 2006, Plaintiffs filed a Response to Defendants' ¹ Motions to Dismiss for Lack of Personal Jurisdiction (2:06-CV-0233-PMP-PAL, Doc. #70). Defendants filed a Reply (2:03-CV-1431-PMP-PAL, Doc. #450) on December 22, 2006.

J. BACKGROUND

This case is one of many in consolidated Multi District Litigation arising out of the energy crisis of 2000-2001. Plaintiffs originally filed the above action in the District Court of Wyandotte County, Kansas. (Notice of Removal, Am. Compl. [2:06-CV-0233-

¹ Four different Defendants filed motions to dismiss for lack of personal jurisdiction in this case raising similar issues and making similar arguments. Plaintiffs filed a consolidated response addressing all four motions to dismiss based on personal jurisdiction. The moving Defendants subsequently filed a joint Reply.

1 PMP-PAL, Doc. #1].) Defendants removed the case to the United States District Court for
2 the District of Kansas. (Id.) The Judicial Panel on Multidistrict Litigation entered a
3 Transfer Order pursuant to 28 U.S.C. § 1407 centralizing the foregoing action in this Court
4 for coordinated or consolidated pretrial proceedings. (Letter dated June 14, 2006 [2:06-CV-
5 0233-PMP-PAL, Doc. #41-1].)

6 In this litigation, Plaintiffs seek to recover damages on behalf of natural gas rate
7 payers. In the First Amended Complaint, Plaintiffs allege Defendants engaged in anti-
8 competitive activities with the intent to manipulate and artificially increase the price of
9 natural gas for consumers. (Am. Compl. at 30-32.) Specifically, Plaintiffs allege
10 Defendants knowingly delivered false reports concerning trade information and engaged in
11 wash trades, which conduct violated Kansas Statutes Annotated § 50-101, et. seq (“Kansas
12 antitrust statutes”). (Id.)

13 Plaintiff Learjet, Inc. (“Learjet”) is a Delaware corporation with its principal
14 place of business in Wichita, Kansas. (Id. at 3.) Plaintiff Cross Oil Refining & Marketing,
15 Inc. (“Cross Oil”) is a Delaware corporation with offices located in Kansas. (Id.) Plaintiff
16 Topeka Unified School District 501 (“Topeka”), is a local government unit, organized
17 under the laws of the State of Kansas with its headquarters in Kansas. (Id. at 4.) Plaintiffs
18 allege they purchased natural gas directly from one or more Defendants, and from other
19 natural gas sellers in the State of Kansas, during the years 2000-2002. (Id. at 3-4.)

20 According to the Amended Complaint, Defendant CMS Energy Corporation
21 (“CMS”) is a Michigan corporation with its principle place of business in Jackson,
22 Michigan. (Id. at 19.) Plaintiffs allege during the relevant time period in which CMS
23 allegedly engaged in conspiratorial misconduct, CMS wholly controlled and dominated its
24 subsidiaries CMS Marketing Services & Trading Company (“CMS Marketing”) and CMS
25 Field Services (“CMS Field”). (Id.) Plaintiffs allege that CMS, directly and through
26 affiliates, entered into a conspiracy which tended to prevent full and free competition or

which tended to advance or control the market prices of natural gas. (Id.) Plaintiffs allege Defendants' alleged conspiracy was "intended to have, and did have, a direct, substantial and reasonably foreseeable effect on United States commerce and on commerce in the State of Kansas." (Id.) Plaintiffs allege CMS's officers or directors made, in furtherance of the conspiracy,

strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which was sold, and those policies and decisions were implemented on an operational level by affiliates, such as CMS Marketing Services & Trading Company and CMS Field Services, in the United States and in the State of Kansas.

(Id. at 20.)

According to the Amended Complaint, CMS is subject to personal jurisdiction in Kansas "based upon the activities of its corporate affiliates, in particular CMS Marketing, Services & Trading Company and CMS Field Services, that traded and sold natural gas in the United States and in the State of Kansas during the relevant period." (Id.) Plaintiffs also allege that in November, 2003, CMS, CMS Marketing and CMS Field paid \$16 million in civil penalties to the United States Commodity Futures Trading Commission "to settle charges of false reporting and attempted manipulation of natural gas prices." (Id.)

Under Federal Rule of Civil Procedure 12(b)(2), Defendant CMS² moves to dismiss for lack of personal jurisdiction because it has not had any contacts with the State of Kansas to support either general or specific jurisdiction under federal due process. CMS also argues it cannot be subjected to personal jurisdiction in Kansas under an alter ego theory, agency theory, or conspiracy theory of personal jurisdiction. In support of its Motion, CMS submitted a Declaration of Michael VanHemert ("VanHemert"), CMS's Corporate Secretary.

² Defendants CMS Marketing (now called CMS Energy Resources Management) and CMS Field do not contest personal jurisdiction in this case.

1 In his Declaration, VanHemert states that CMS is a holding company and does
2 not have any daily operations of its own. (Def. CMS Energy Corp.'s Mot. to Dismiss for
3 Lack of Personal Jurisdiction, Decl. of Michael VanHemert ["VanHemert Decl."], at 2.)
4 VanHemert states that CMS's subsidiaries, CMS Marketing and CMS Field, are separate
5 business entities that operate independently from CMS and that CMS is not involved in, and
6 did not control, the day-to-day operations of either subsidiary. (Id. at 3-5.) In addition,
7 VanHemert states both subsidiaries adhere to separate corporate formalities, were not
8 undercapitalized, maintained separate bank accounts, maintained separate books and
9 records, and conducted operations that were substantially separate from CMS. (Id.)

10 VanHemert also states that while its subsidiaries engaged in activities relating to
11 natural gas trading and reporting, CMS itself conducts no business in Kansas; has never
12 been qualified to do business in Kansas; has never aimed or targeted activities toward
13 Kansas; has never maintained a registered agent in Kansas; and has never had an office,
14 mailing address, telephone number, bank account, or real or personal property in Kansas.
15 (Id.) VanHemert further states that CMS has never employed anyone in Kansas; has never
16 paid taxes in Kansas; and has never manufactured products, performed services, or made
17 sales in Kansas. (Id.) Regarding natural gas transactions, VanHemert declares that CMS
18 does not, and did not during the relevant time period, engage in natural gas trading,
19 production, sales, distribution, or transportation anywhere, including the State of Kansas.
20 (Id.) In addition, VanHemert states CMS has never reported or published natural gas price
21 or volume information to any trade publication anywhere, including Kansas. (Id. at 3.)

22 Plaintiffs respond that they have met their *prima facie* burden under the Kansas
23 long-arm statute because the Amended Complaint alleges CMS's affiliates transacted
24 business in Kansas in furtherance of a conspiracy to which CMS was a party. In addition,
25 Plaintiffs contend the Kansas long-arm statute covers tortious conduct occurring outside of
26 Kansas that causes injury in Kansas and that CMS's antitrust violations constitute a tort.

1 Moreover, Plaintiffs argue CMS is subject to jurisdiction in Kansas under the conspiracy
2 theory of jurisdiction. Plaintiffs did not present any evidence to support their jurisdictional
3 allegations in the Amended Complaint.

4 **II. DISCUSSION**

5 "When a defendant moves to dismiss for lack of personal jurisdiction, the
6 plaintiff bears the burden of demonstrating that the court has jurisdiction over the
7 defendant." Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1154 (9th Cir. 2006). To meet this
8 burden, a plaintiff must demonstrate that personal jurisdiction over a defendant is (1)
9 permitted under the applicable state's long-arm statute and (2) that the exercise of
10 jurisdiction does not violate federal due process. Id. In diversity cases such as this, "a
11 federal court applies the personal jurisdiction rules of the forum state provided the exercise
12 of jurisdiction comports with due process." Scott v. Breeland, 792 F.2d 925 (9th Cir.
13 1986). However, "federal law is controlling on the issue of due process under the United
14 States Constitution." Data Disc, Inc. v. Sys. Tech. Assoc., Inc., 557 F.2d 1280, 1286 n.3
15 (9th Cir. 1977). Therefore, the Court will apply Kansas law in deciding whether personal
16 jurisdiction is appropriate under the Kansas long-arm statute and the Court will apply Ninth
17 Circuit law in deciding whether jurisdiction is appropriate under the due process clause.
18 See In re Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1174 (D.C. Cir. 1987)
19 (concluding that "the transferee court [should] be free to decide a federal claim in the
20 manner it views as correct without deferring to the interpretation of the transferor circuit.");
21 Menowitz v. Brown, 991 F.2d 36, 40 (2d Cir. 1993) (holding that "a transferee federal court
22 should apply its interpretations of federal law, not the constructions of federal law of the
23 transferor circuit").

24 Under the Kansas long-arm statute, "[a]ny person, whether or not a citizen or
25 resident of this state, who in person or through an agent or instrumentality does any of the
26 acts hereinafter enumerated, thereby submits the person and, if an individual, the

1 individual's personal representative, to the jurisdiction of the courts of this state" Kan.
 2 Stat. Ann. § 60-308(b). Examples of enumerated acts include transacting business within
 3 Kansas, committing a tortious act within Kansas, and owning, using, or possessing real
 4 estate in Kansas. Id. "The Kansas long arm statute . . . is liberally construed to assert
 5 personal jurisdiction over nonresident defendants to the full extent permitted by the due
 6 process clause of the Fourteenth Amendment to the United States Constitution." In re
 7 Heston Corp., 870 P.2d 17, 25 (Kan. 1994).

8 To satisfy due process, a nonresident defendant must have "minimum contacts"
 9 with the forum state so that the assertion of jurisdiction does not offend traditional notions
 10 of fair play and substantial justice. Pebble Beach Co., 453 F.3d at 1155 (citing Int'l Shoe
 11 Co. v. Washington, 326 U.S. 310, 315 (1945)). A federal district court may exercise either
 12 general or specific personal jurisdiction. See Helicopteros Nacionales de Colombia, S.A. v.
 13 Hall, 466 U.S. 408, 414-15 (1984). Because Plaintiffs do not contend general jurisdiction
 14 applies, the Court will determine whether specific jurisdiction is appropriate in this case.

15 A nonresident defendant's contacts with the forum state may permit the exercise
 16 of specific jurisdiction if: (1) the defendant has performed some act or transaction within
 17 the forum or purposefully availed himself of the privileges of conducting activities within
 18 the forum, (2) the plaintiff's claim arises out of or results from the defendant's forum-
 19 related activities, and (3) the exercise of jurisdiction over the defendant is reasonable.
 20 Pebble Beach Co., 453 F.3d at 1155-56. "If any of the three requirements is not satisfied,
 21 jurisdiction in the forum would deprive the defendant of due process of law." Omeluk v.
 22 Langsten Slip & Batbyggeri A/S, 52 F.3d 267, 270 (9th Cir. 1995).

23 Under the first prong of the "minimum contacts test," the plaintiff must establish
 24 either that the defendant "(1) purposefully availed himself of the privilege of conducting his
 25 activities in the forum, or (2) purposefully directed his activities toward the forum." Pebble
 26 Beach, 453 F.3d at 1155. "Evidence of availment is typically action taking place in the

1 forum that invokes the benefits and protections of the laws in the forum.” *Id.* Evidence of
 2 direction usually consists of conduct taking place outside the forum that the defendant
 3 directs at the forum. *Id.* at 1155-56.

4 The purposeful direction aspect of the first prong is satisfied when a foreign act is
 5 both aimed at and has effect in the forum. *Id.* In other words, the defendant “must have (1)
 6 committed an intentional act, which was (2) expressly aimed at the forum state, and (3)
 7 caused harm, the brunt of which is suffered and which the defendant knows is likely to be
 8 suffered in the forum state.” *Id.* To satisfy the third element of this test, the plaintiff must
 9 establish the defendant’s conduct was “expressly aimed” at the forum; a “mere foreseeable
 10 effect” in the forum state is insufficient. *Id.* The “express aiming” requirement is satisfied
 11 when the defendant is alleged to have engaged in wrongful conduct “individually targeting
 12 a known forum resident.” Bancroft & Masters, Ins. v. Augusta Nat. Inc., 223 F.3d 1082,
 13 1087 (9th Cir. 2000).

14 The second prong of the specific jurisdiction test requiring that the contacts
 15 constituting purposeful availment or purposeful direction give rise to the current action, is
 16 measured in terms of “but for” causation. *Id.* at 1088. Under the last prong of the specific
 17 jurisdiction test, courts generally consider a variety of factors to determine whether
 18 exercising jurisdiction would be reasonable:

19 (1) the extent of the defendant’s purposeful interjection into the forum
 20 state, (2) the burden on the defendant in defending in the forum, (3) the
 21 extent of the conflict with the sovereignty of the defendant’s state, (4)
 22 the forum state’s interest in adjudicating the dispute, (5) the most
 23 efficient judicial resolution of the controversy, (6) the importance of
 24 the forum to the plaintiff’s interest in convenient and effective relief,
 25 and (7) the existence of an alternative forum.

26 *Id.* A court must balance all seven factors and no factor is determinative. Core-Vent Corp.
v. Nobel Indus., 11 F.3d 1482, 1488 (9th Cir. 1993).

27 Where the issue is before the Court on a motion to dismiss based on affidavits
 28 and discovery materials without an evidentiary hearing, the plaintiff must make “a prima

1 facie showing of facts supporting jurisdiction through its pleadings and affidavits to avoid
 2 dismissal.” Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284
 3 F.3d 1114, 1119 (9th Cir. 2002). The Court accepts as true any uncontroverted allegations
 4 in the complaint and resolves any conflicts between the facts contained in the parties’
 5 evidence in the plaintiff’s favor. Id. However, for personal jurisdiction purposes, a court
 6 “may not assume the truth of allegations in a pleading which are contradicted by affidavit.”
 7 Alexander v. Circus Circus Enter., 972 F.2d 261, 262 (9th Cir. 1992).

8 **A. Transacting Business under Agency or Alter Ego Theory**

9 Business is transacted within Kansas when a person is within or enters the state in
 10 person or by agent and deals with another within the state and thereby “effectuates or
 11 attempts to effectuate a purpose to improve his economic conditions and satisfy his
 12 desires.” Volt Delta Resources, Inc. v. Devine, 740 P.2d 1089, 1092 (Kan. 1987).
 13 However, “mere ownership of all stock of a subsidiary will not, in and of itself, subject the
 14 parent corporation to the jurisdiction of the state where the subsidiary is doing business.
 15 The test is whether the local corporation’s identity as a distinct corporate identity is
 16 observed.” Farha v. Signal Companies, Inc., 532 P.2d 1330, 1337 (Kan. 1975) (citing
 17 Cannon Mfg. Co. v. Cudahy Co., 267 U.S. 333 (1925)). “[W]hen a corporation exercises
 18 such control and domination over its subsidiary that it no longer has a will, mind, or
 19 existence of its own, and operates merely as a department of the parent corporation, both
 20 corporations should be treated as a single economic entity.” Id. at 1338; see also Snowden
 21 By & Through Victor v. Connaught Labs., Inc., 793 F. Supp. 1040, 1043 (D. Kan. 1992)
 22 (concluding that “the degree and direction of control exerted by one corporation over the
 23 other and the flow of benefits from the forum are all relevant in determining the nature of
 24 the relationship”).

25 Under the alter ego theory, Kansas law will not extend the fiction of separate
 26 corporate identities where some fraud or injustice would result. Dean Operations, Inc. v.

1 One Seventy Assocs., 896 P.2d 1012, 1016 (Kan. 1995). “The ultimate test for imposing
2 alter ego status is whether, from all of the facts and circumstances, it is apparent that the
3 relationship between the parent and subsidiary is so intimate, the parent’s control over the
4 subsidiary is so dominating, and the business and assets of the two are so mingled that
5 recognition of the subsidiary as a distinct entity would result in an injustice to third parties.”
6 Doughty v. CSX Transp., Inc., 905 P.2d 106, 111 (Kan. 1995).

7 In making this determination, Kansas courts weigh ten factors: (1) whether the
8 parent corporation owns all or a majority of the capital stock of the subsidiary; (2) whether
9 the corporations have common directors or officers; (3) whether the parent corporation
10 finances the subsidiary; (4) whether the parent corporation subscribed to all of the capital
11 stock of the subsidiary or otherwise caused its incorporation; (5) whether the subsidiary has
12 grossly inadequate capital; (6) whether the parent corporation pays the salaries or expenses
13 or losses of the subsidiary; (7) whether the subsidiary has substantially no business except
14 with the parent corporation or no assets except those conveyed to it by the parent
15 corporation; (8) whether the parent corporation’s papers and its officers’ statements refer to
16 the subsidiary as a department or division; (9) whether the subsidiaries’ directors or
17 executives do not act independently in the subsidiaries’ interest but take direction from the
18 parent corporation; and (10) whether the formal legal requirements of the subsidiary as a
19 separate and independent corporation are not observed. Id.

20 Plaintiffs have not satisfied their burden of establishing personal jurisdiction over
21 CMS based on an agency theory. Subjecting CMS to jurisdiction in Kansas based upon
22 CMS Marketing or CMS Field’s alleged business transactions in Kansas would be
23 inappropriate because Plaintiffs have not sufficiently alleged or shown that CMS exercises
24 such domination and control over its subsidiaries that they no longer have a will, mind, or
25 existence of their own. The allegations in the Amended Complaint do not support, and
26 VanHemert’s Declaration directly controverts, Plaintiffs’ conclusory allegations that CMS

1 “dominates and controls” its affiliates and that CMS “made strategic marketing policies and
2 decisions concerning natural gas and the reporting of natural gas” which were
3 “implemented on an operational level by affiliates.” (Am. Compl. at 19-20.) VanHemert
4 states:

5 CMS . . . did not direct any affiliated company during the Relevant
6 Time Period to engage in any of the conduct alleged in this action or
7 participate in such conduct. CMS . . . did not control any affiliated
company’s day to day operational policies with respect to any of the
conduct alleged in this action during the Relevant Time Period.

8 (VanHemert Decl. at 3.) VanHemert also states CMS was not involved in its subsidiaries’
9 day-to-day operations, that each subsidiary’s own management controlled its day-to-day
10 operations, and that CMS only concerned itself with major policy issues related to its
11 subsidiaries. (Id. at 3-5.) VanHemert further declares CMS’s control over its subsidiaries
12 was “no greater than would be expected by a parent holding company.” (Id.) Plaintiffs did
13 not offer any evidence to contradict VanHemert’s Declaration. Consequently, in light of
14 VanHemert’s Declaration, Plaintiffs allegations in the Amended Complaint, without more,
15 do not establish CMS is subject to jurisdiction in Kansas based upon its own or its
16 affiliates’ alleged contacts under an agency theory.

17 Further, Plaintiffs have failed to satisfy their burden under the alter ego theory of
jurisdiction. Plaintiffs made no attempt to allege facts supporting jurisdiction under the ten-
18 factor test and have not shown that CMS’s relationship with its subsidiaries is so intimate
19 and dominating, and that the business and assets of CMS and its subsidiaries are so
20 mingled, that recognition of CMS Marketing and CMS Field as separate entities would
21 result in an injustice. However, even if Plaintiffs had made such allegations, VanHemert’s
22 Declaration would contradict them. VanHemert states that CMS’s subsidiaries functioned
23 in all respects and were treated as separate business entities from CMS. (Id.) VanHemert
24 also states that CMS’s subsidiaries maintained separate bank accounts and funds from
25 CMS, were self-sustaining business entities, were not undercapitalized, adhered to separate
26

1 corporate formalities, and maintained separate corporate books and records. (Id.)
2 Moreover, Plaintiffs failed to produce any competing evidence. For all of these reasons,
3 Plaintiffs failed to meet their burden of establishing personal jurisdiction over CMS under
4 the alter ego theory.

5 **B. Tortious Act**

6 The Kansas long-arm statute allows a plaintiff to bring suit in Kansas to recover
7 for injuries occurring in Kansas that resulted from tortious conduct outside the state. Ling
8 v. Jan's Liquors, 703 P.2d 731, 734 (Kan. 1985). A plaintiff's injury may be either physical
9 or economic. Merriman v. Crompton Corp., 146 P.3d 162, 180 (Kan. 2006). Under
10 Kansas law, "a price-fixing conspiracy may be a tortious act under K.S.A. 60-308(b)(2)."
11 Id. at 181.

12 In Merriman, the Kansas Supreme Court held that a Kansas plaintiff could sue a
13 group of non-resident defendants in Kansas because the plaintiff paid an inflated price for
14 tires purchased in Kansas as a result of an out-of-state price-fixing agreement between the
15 defendants. Id. at 167. The Kansas Supreme Court reasoned that a price-fixing conspiracy
16 constituted tortious conduct under the Kansas long-arm statute and that at the time the
17 defendants entered into the price-fixing conspiracy, they reasonably could have expected
18 the conspiracy to reach Kansas consumers. Id. at 181, 187.

19 Plaintiffs allege CMS "entered into a combination and conspiracy between the
20 defendants which tended to prevent full and free competition in the trading and sale of
21 natural gas, or which tended to advance or control the market prices of natural gas." (Am.
22 Compl. at 19.) Plaintiffs allege Defendants' conspiracy injured them because they paid
23 more for natural gas than they would have paid absent Defendants' conspiracy, were
24 deprived of the benefit of full and free competition, and were deprived of the right to make
25 risk management, resource allocation and other financial decisions in a full and free
26 competitive market. (Id. at 37-38.) Based on Kansas law, CMS's participation in an

1 alleged conspiracy to advance or control prices and to report falsely gas trade information is
2 a tortious act under Kan. Stat. Ann. § 60-308(b)(2). Further, Kansas law permits Plaintiffs
3 to bring suit in Kansas to recover for their injuries occurring in Kansas that resulted from an
4 alleged antitrust conspiracy outside the state.

5 However, exercising specific jurisdiction over CMS based on the tortious act
6 provision of the Kansas long-arm statute would violate due process. Under the first prong
7 of the specific jurisdiction test, Plaintiffs have not sufficiently alleged or shown that CMS
8 purposefully availed itself of the privilege of conducting activities in Kansas. Plaintiffs
9 have failed to show CMS itself took actions inside Kansas invoking the benefits and
10 protections of its laws. However, even if Plaintiffs' had made such allegations,
11 VanHemert's Declaration would contradict them. Instead, Plaintiffs alleged CMS is subject
12 to personal jurisdiction in Kansas based on its affiliates' activities within the forum.

13 Plaintiffs have also failed to satisfy the purposeful direction test because the
14 "express aiming" prong requires Plaintiffs to allege CMS engaged in wrongful conduct
15 targeted at a plaintiff whom CMS knows to be a resident of the forum state. Plaintiffs did
16 not make such an allegation. Under Ninth Circuit law, Plaintiffs' broad allegations that
17 CMS's actions "tended" to prevent free competition or tended to advance or control "the
18 market prices of natural gas" do not satisfy the express aiming requirement. Likewise,
19 Plaintiffs' allegation that CMS's actions "were intended to have, and did have, a direct,
20 substantial and reasonably foreseeable effect on United States commerce and on commerce
21 in the State of Kansas" does not pass the express aiming requirement. Broad allegations
22 that CMS's participation in a conspiracy tended to affect market prices of natural gas
23 generally and that it was reasonably foreseeable that such conspiracy would affect
24 commerce throughout the United States and commerce in Kansas is insufficient to establish
25 the express aiming necessary to satisfy the first prong of the specific jurisdiction test.
26 Consequently, because Plaintiffs have not met their burden of establishing the first prong of

1 the specific jurisdiction test, exercising jurisdiction under a tortious act theory would violate
2 due process.

3 **C. Conspiracy Theory**

4 Plaintiffs also argue that they may use the conspiracy theory of personal
5 jurisdiction as an alternative basis for establishing personal jurisdiction over CMS.
6 Plaintiffs contend the Kansas Supreme Court expressly adopted the conspiracy theory in
7 Merriman and that pursuant to the theory, where a co-conspirator commits a tort that has
8 foreseeable consequences in Kansas, a defendant who is a participant in the conspiracy is
9 also subject to personal jurisdiction in Kansas. CMS responds that while Kansas may
10 accept the conspiracy theory of jurisdiction, the Ninth Circuit rejects the conspiracy theory
11 because it violates due process principles. In addition, CMS argues Plaintiffs failed to
12 produce any factual support for their conspiracy theory allegations.

13 Kansas law recognizes that “if one conspirator commits acts in Kansas in
14 furtherance of the conspiracy and that conspirator falls under the act, jurisdiction can be
15 obtained as to all conspirators.” Merriman, 146 P.3d at 181. In Merriman, the Kansas
16 Supreme Court concluded that because the alleged conspiracy resulted in alleged economic
17 injury to the plaintiff in Kansas, jurisdiction over the defendants’ tortious conduct could be
18 based on the defendants’ deliberate choice to enter into a conspiracy. Id. at 187. The policy
19 behind the conspiracy theory is to allow a court “to assert jurisdiction over [those] whom
20 jurisdiction would otherwise be lacking.” Id. at 182. The Kansas Supreme Court has noted
21 that “asymmetry would result if coconspirators are allowed to enjoy the benefits and
22 protections of the forum state’s laws without being subject to personal jurisdiction in that
23 forum.” Id. at 186.

24 However, “[m]ere allegation of conspiracy, without some sort of *prima facie*
25 factual showing of a conspiracy, cannot be the basis of personal jurisdiction of
26 co-conspirators outside the territorial limits of the court.” Dodson Int’l Parts, Inc. v.

1 Altendorf, 181 F. Supp. 2d 1248, 1254 (D. Kan. 2001). “[C]ourts faced with allegations of
 2 a conspiracy to commit a ‘business tort’ which has foreseeable consequences in the forum
 3 state [should] uphold jurisdiction unless the allegations of conspiracy are too conclusory,
 4 too unsupported to be given credence.” Prof'l Investors Life Ins. Co. v. Roussel, 445 F.
 5 Supp. 687, 696 (D. Kan. 1978).

6 Although the Ninth Circuit has not expressly accepted or rejected the conspiracy
 7 theory of personal jurisdiction, it rejected the conspiracy theory in the venue context, and
 8 federal district courts in the Ninth Circuit have rejected the theory as applied to personal
 9 jurisdiction. Piedmont Label Co. v. Sun Garden Packing Co., 598 F.2d 491, 492 (9th Cir.
 10 1979) (rejecting conspiracy theory of venue); Kipperman v. McCone, 422 F. Supp. 860, 873
 11 n.14 (N.D. Cal. 1976) (finding that “personal jurisdiction over any non-resident individual
 12 must be premised upon forum-related acts personally committed by the individual” and that
 13 “imputed conduct is a connection too tenuous to warrant the exercise of personal
 14 jurisdiction”); Karsten Mfg. Corp. v. U.S. Golf Ass'n, 728 F. Supp. 1429, 1434 (D. Ariz.
 15 1990) (same); see also Steinke v. Safeco Ins. Co. of Am., 270 F. Supp. 2d 1196, 1200 (D.
 16 Mont. 2003); Silver Valley Partners, LLC v. De Motte, 400 F. Supp. 2d 1262, 1268 (W.D.
 17 Wash. 2005).

18 Regardless of whether the Ninth Circuit would accept or reject the conspiracy
 19 theory of personal jurisdiction, for the same reason Plaintiffs failed to establish specific
 20 jurisdiction under a tortious act theory, Plaintiffs have failed to establish specific
 21 jurisdiction under a conspiracy theory. Plaintiffs broad and conclusory allegations that
 22 CMS entered into a “combination and conspiracy” with the other Defendants in this action
 23 “which tended to advance or control the market prices of natural gas” or which “tended to
 24 prevent full and free competition” or which effected United States commerce or commerce
 25 in Kansas do not satisfy the express aiming requirement under the due process analysis.
 26 Further, Plaintiffs’ allegation that all of the Defendants in this action conspired to commit

1 unlawful acts that they could reasonably foresee would injure Plaintiffs and others in the
2 State of Kansas is insufficient under the express aiming requirement. A “foreseeable effect”
3 in the forum state is inadequate to show the purposeful direction necessary to establish
4 specific jurisdiction. The Ninth Circuit requires an allegation that CMS engaged in
5 wrongful conduct, whether a conspiracy or some other conduct, that individually targets a
6 known forum resident. Because Plaintiffs failed to make such an allegation, specific
7 jurisdiction is lacking in this case and subjecting CMS to jurisdiction in Kansas under a
8 conspiracy theory would violate due process. The Court therefore will grant Defendant
9 CMS’s motion to dismiss for lack of personal jurisdiction.

10 **III. CONCLUSION**

11 IT IS THEREFORE ORDERED that Defendant CMS Energy Corporation’s
12 Motion to Dismiss for Lack of Personal Jurisdiction (2:06-CV-0233-PMP-PAL, Doc. #59)
13 is hereby GRANTED. Plaintiffs’s Amended Complaint is hereby dismissed without
14 prejudice against Defendant CMS Energy Corporation for lack of personal jurisdiction.

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16 DATED: August 16, 2007.

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19 _____
20 PHILIP M. PRO
21 United States District Judge
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